GENERAL OVERVIEW OF WISHA INSPECTIONS AND ENFORCEMENT:

A PRACTICAL PERSPECTIVE

PREPARED FOR THE
WASHINGTON BAR ASSOCIATION'S
CONTINUING LEGAL EDUCATION SEMINAR #720

REVISED AND REPRINTED BY
DEPARTMENT OF LABOR AND INDUSTRIES
WISHA SERVICES DIVISION
WISHA POLICY & TECHNICAL SERVICES

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Original Prepared January, 1997

Reformatted and Revised
December 1998

Reformatted and Revised
November 2001

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I. INTRODUCTION

One important aspect of Title 49.17 RCW, the Washington Industrial Safety and Health Act (WISHA), is enforcement. The law gives the Department of Labor and Industries (L&I) both the right and the responsibility to make "inspections of work places without advance notice" (RCW 49.17.050(6)). In conducting such inspections, L&I is specifically empowered by RCW 49.17.070 to enter workplaces "without delay and at reasonable times," to conduct inspections and private interviews, and to require the attendance and testimony of witnesses. RCW 49.17.120 authorizes L&I to issue citations for violations discovered during an inspection.

Although the law acknowledges the responsibility of employees to follow safe work practices, the enforcement mechanisms provided to L&I are almost exclusively directed at the employer (as most employer groups acknowledged during congressional discussions of the federal Occupational Safety and Health Act, managing and disciplining employees is an employer responsibility). The most common such mechanism is the civil penalty provided for by RCW 49.17.180, which is issued whenever a serious violation is cited. Penalties are also authorized for repeat, failure-to-abate, and willful violations, and the statute requires them for certain non-serious, or "general" violations. The statute also authorizes penalties for other general violations, although current department policy (adopted in response to the Regulatory Reform Act of 1995) is not to issue such penalties.

This overview focuses on the basic inspection process, with a particular focus on classification of violations and calculation of penalties, as well as on the appeals process.

II. Basic Inspection Process

A. Inspection Selection

Inspections are selected according to a series of protocols. The basic order of priority of inspections is as follows:

Priority	*Category*
First	Imminent Danger
Second	Fatality/Catastrophe Investigations
Third	Complaints/Referrals Investigations
Fourth	Programmed Inspections

It should also be noted that, as a general rule, the more serious the apparent or alleged hazard, the higher the priority given to the inspection.

For WISHA purposes, an "imminent danger" exists whenever a condition or practice creates a danger that could *reasonably* be expected to cause death or serious physical harm immediately or before such danger can be eliminated through ordinary WISHA enforcement procedures.

Inspections dealing with such hazards, whether based on a complaint or on an inspector's observation during the course of his or her duties, take priority over all other enforcement activities.

Fatality and catastrophe investigations are mandated under RCW 49.17.260. Any workplace fatality, probable fatality, or incident requiring the hospitalization of two or more employees, must be reported to L&I within eight hours. The resulting investigations are among the most complex WISHA enforcement activities (most inspections focus on *what is happening* at the time of the inspection, not on *what has already happened*) and take priority over most routine inspection activity. They normally take weeks and even months to complete.

Complaints (filed by employees or their representatives) and referrals (filed by non-employees) may result in either an inspection or a "complaint investigation," which is normally conducted by a combination of telephone and facsimile machine contact. Complaints alleging only general violations are often handled by letter from the supervisor in the field. However, the regional WISHA compliance supervisor has the discretion to assign any complaint or referral as an inspection if he or she determines that such action is appropriate. Such inspections normally take precedence over "programmed" inspections (and complaints normally take precedence over referrals), but the nature of the hazards alleged and scheduling issues may also be taken into consideration.

Programmed inspections are those inspections conducted as a result of L&I's efforts to focus its limited resources on the most serious hazards and to schedule its work appropriately. They are not random inspections, nor are they generally the result of a single, specific event. WISHA targeting is based both on the hazardous nature of a particular industry (construction, logging, electric utilities, and maritime are all considered "high-hazard" industries, while asbestos and other specific activities are considered "special emphasis" programs) and on employer-specific injury and illness data. As Washington's exclusive workers' compensation provider, L&I is able to draw on meaningful claims data to make its targeting efforts more effective and credible.

B. Opening Conference

Normally, inspections begin with a contact between the inspector and the most senior management person available, where the inspector presents his or her credentials. The inspector will then conduct an opening conference with the employer *and* employee representatives, although it may be abbreviated by the inspector depending upon the conditions at the worksite. In the opening conference, the inspector will explain the reason(s) for the inspection, its expected scope, the participation of employee representatives, the basic inspection process, and the employer's responsibilities under WISHA. If the inspection is the result of a complaint or a referral, the inspector will provide a copy of the text of the complaint, with any identifying material deleted.

C. Walk-Around Inspection

The primary purpose of the walk-around inspection is to identify potential safety and/or health hazards that are present in the workplace, as well as to observe work processes and interview

employees as appropriate. All inspections should include an evaluation of the employer's safety and health program (whether it is in writing as required or not) and its effectiveness in practice. In addition, the inspector should follow up on previous citations.

The inspector will normally take notes during the walk-around and will often conduct interviews; he or she may also ask for signed statements. In addition, the inspector may take photographs and/or videotapes to document any hazards observed as well as overall work processes and practices. The inspector will normally bring any apparent violations to the attention of the employer so that they can be corrected immediately. In industrial hygiene inspections, the inspector may take samples or arrange for monitoring of possible chemical or noise exposures over a period of time.

D. Closing Conference

At the close of the inspection, but before a citation is prepared, the inspector will hold a closing conference with the employer and employee representatives. In some simpler inspections (such as those of a construction work site), the opening conference, walk-around inspection, and closing conference may be held in the course of a single visit. In some more complex inspections, closing conferences may be held some weeks or even months after the opening conference, and there may even be more than one closing conference. In some cases, closing conferences can be held over the phone -- and it may be appropriate to hold separate closing conferences with the employer and employee representatives.

During the closing conference, the inspector describes any apparent violations, as well as any other pertinent issues (hazards for which no violation can be identified due to a missing element, for example, but which should be brought to the employer's attention). The inspector also provides additional information about the rights and responsibilities of the parties, as well as available L&I services. He or she provides an opportunity for additional information to be provided by either the employer or the employee representatives (this is particularly important if the period of time between the opening and closing conferences is brief), which may alter the inspector's conclusion and therefore any alleged violations.

III. Citations

Citations are not issued by the inspector at the job site, or even during the closing conference. Following every inspection, L&I will issue a "citation and notice" to the employer. These citations are developed by the inspector and reviewed by his or her supervisor before they are mailed to the employer. Even an inspection that does not result in a violation will normally result in a "citation," in this case reflecting the fact that no violations were documented. Citations must be issued within six months of a probable violation being identified by the inspector, but most citations are issued much sooner.

A. Elements of a Violation

A good practical guide to the elements needed when a violation is to be cited can be summarized by the acronym HECK (like any such summary, the information is somewhat oversimplified, but it provides a "working definition" of a violation in most circumstances):

H *Hazard*
E *Employee Exposure*
C *Code*
K *Knowledge (Employer)*

The first element of a violation is the most basic one: A ***hazard*** must be documented. L&I does not engage in strictly "code-based" enforcement of the WISHA standards. Inspectors have been given standing instructions that if a hazard is not present, any code violation is to be considered *de minimis* and therefore not cited as a violation (this contrasts somewhat with the practice of the federal Occupational Safety and Health Administration (OSHA), which actually cites the violation as "*de minimis*" -- but the practical effect is the same). This is most frequent when the inspector is dealing with a relatively old code or when a particular set of circumstances combine to eliminate the hazard. It is also possible that the employer has provided a greater degree of protection than the code requires (for example, the use of standard fall protection gear in lieu of a guardrail is not provided for by the guardrail requirements of the general industry standard, but it would not be cited in most circumstances because the harness would actually provide greater protection than the guardrail).

The second element is ***employee exposure***. Given that a hazard exists, it is also necessary to document that employees (or those few employers subject to WISHA jurisdiction) are exposed to that hazard. Depending upon the nature of the hazard, it may be possible to document such exposure without actually observing a particular exposed employee. For example, an unguarded saw that has clearly been used in a manufacturing plant represents at least *prima facie* evidence of employee exposure, although employee interviews can and should be used to document more fully the nature and extent of the exposure.

The third element of a violation is an applicable ***code***. When a clear hazard is involved, there is always an applicable WISHA code, since the "general duties" or "safe place" standard provides a general requirement to provide a "safe and healthful workplace." However, such citations must meet specific requirements that have been developed through years of case law. In any case, it is incumbent on the inspector to cite the applicable code, since the "safe place" standard can only be used when no other applicable code exists. L&I does not cite "general" hazards under the safe place standard.

The final element -- employer ***knowledge*** -- is generally the easiest to prove and also the one most frequently argued by employers. The inspector need not prove that the employer actually knew about the hazard, but simply that he or she should have known. In most circumstances, the fact that the inspector could identify the hazard presents a strong presumption against an employer who invokes lack of knowledge as a protection against citation. However, in cases of

unusual hazards or atypical operations by an employer, knowledge may become a more significant issue.

B. Classification of Violations

When a violation has been identified by an inspector, it must be classified. The primary determination is whether it is a serious violation or a general violation. Other questions must also be answered regarding repeat, failure-to-abate, or willful violations, but those are most appropriately addressed as part of the calculation of penalties.

For WISHA purposes, a general violation is a violation where, although the most serious injury or illness that would be likely to result from a hazardous condition cannot reasonably be predicted to cause death or serious injury to exposed employees, it does have a direct and immediate relationship to their safety and health. A serious violation is the opposite -- a violation where there is a "substantial probability" that death or serious physical harm could result from the hazard.

It is important to note that the key distinction between the two is based upon *the most serious injury that would be likely to result*, not on the most likely injury to occur (nor on the likelihood that the injury *will* occur, for that matter). For this reason, a failure to require the use of fall protection by employees working 12 feet above the ground would be cited serious except in truly extraordinary circumstances. It is not necessary to determine whether it is more likely that an employee falling that distance would be seriously injured or not. It is sufficient to recognize that death or serious injury is *a* likely result of a fall from 12 feet.

At the same time, it is worthwhile to acknowledge that not all conceivable injuries can reasonably be described as "likely to result." For example, to suggest that an otherwise relatively innocent rash caused by a particular chemical exposure might become infected and that the infection might spread to the degree that it could become life threatening is an unreasonable extrapolation in most cases. The employer does have a responsibility in such a case to protect the employee from the rash, but such a violation would normally be cited as general.

In certain circumstances, the sheer number of otherwise general violations may combine to create one or more serious violations. Although taken individually, they may not create a substantial probability of serious physical harm, taken as a group, they do represent such a potential.

C. Grouping of Violations

It is not uncommon that a single violative condition is addressed by multiple safety and health standards. In such cases, the inspector will group the violations into one if the same corrective measure will automatically fix all of the violations. All applicable codes will be listed and all the grouped violations must be corrected, but any penalty will be assessed based only on violation with the highest gravity-based penalty calculation. Grouping may also be used, as noted above, to acknowledge the severity of what would otherwise be a large number of general violations.

D. Calculation of Penalties

Penalties are not designed as punishment to employers nor as a source of income to L&I (the money goes to the Supplemental Pension Fund, which also receives premium income directly from employers and employees). Rather, they are intended to deter violations of WISHA and must therefore be sufficient for that purpose.

1. General Violations

Most *general violations* result in no penalty being issued. In those cases where a penalty is required by statute (posting requirements, recordkeeping requirements, etc.), the penalty is $100.

2. Serious Violations

Penalties for individual *serious violations* may range from $100 (minimum established by L&I policy) to $7,000 (maximum established by statute). Typical penalties, however, are in the neighborhood of $600 to $1200 for most employers.

RCW 49.17.180(7) requires L&I to give due consideration to the following factors when assessing penalties:

the gravity of the violation

the size of the business

the good faith of the employer

the employer's history of previous violations

the number of affected employees

The first and last items listed are taken into account when the inspector calculates the "gravity-based penalty," which is based on the inspector's assessment of the *severity* of the injury or illness that could result and the *probability* that an injury an illness could result. The number of affected employees is considered within the context of probability. Both severity and probability are assigned a rating from 1 through 6 (serious violations are always assigned a severity rating of 4, 5 or 6). The two numbers are multiplied together to provide the "gravity" of the violation, a number from 1 through 36.

This gravity is assigned a "base penalty" in the penalty chapter (and on the "penalty worksheet" used by the inspector). Only a violation with both a severity and a probability of 6 will be assigned a base penalty of $7,000. A more typical example follows:

The inspector determines that the fall protection violation being cited merits a relatively high severity of 5 and a somewhat more moderate probability of 4 (based on conditions at the job site and the duration of exposure), for a gravity factor of 20. The base penalty for such gravity is $5,000.

The inspector then considers the "good faith" of the employer in relation to that particular violation ("good faith" is the only penalty adjustment factor that may vary from violation to violation in the course of a single inspection). Based on past efforts, the employer's overall accident prevention program, the employer's cooperation during the inspection, the rapidity of abatement after the violation was identified, etc., the inspector assigns one of four "good faith" ratings: The employer will be given "excellent faith" (a 35 percent reduction), "good faith" (a 20 percent reduction), "fair faith" (no adjustment), or "poor faith" (a 20 percent increase). The example above continues:

Because the employer immediately corrected the violation and was generally cooperative during the inspection, and based on other factors, the inspector assigns a rating of "good faith" to the violation. This reduces the base penalty of $5,000 by 20 percent, to $4,000.

The next (and often most significant) adjustment made by the inspector relates to the size of the business. The inspector must determine the number of employees working for the business in Washington (they need not be exposed to the hazard, or even involved in the same operation, because this adjustment is based on employer size, *not* the number of exposed employees). All employers with 250 or fewer employees receive at least a 20 percent reduction in the base penalty. Employers with 25 or fewer employees receive a 60 percent reduction. The example continues:

The inspector determines that the employer, a construction and real estate firm, has four employees on this construction site. However, industrial insurance records and interviews with the employer confirm that the business employees roughly 30 people statewide. The penalty reduction for an employer in the 26-100 category is 40 percent <u>of the base penalty</u>, cutting the remaining penalty in half, to $2,000.

The final adjustment to the penalty is based on the employer's history of violations. Although in most occupational safety and health jurisdictions, this calculation is based solely on inspection history, L&I is able to apply a wider criterion. With the endorsement of several employer groups, L&I's penalty guidance instructs inspectors to include industrial insurance claims history in their review. This provides a broader perspective on hazardous conditions that represent "violations" of WISHA, and avoids refusing a reduction to a safe employer with an excellent safety record simply because he or she has never been inspected before. Using these two sources of information, the inspector assigns either "good" (10 percent reduction), "fair" (no adjustment), or "poor" (10 percent increase). The example concludes:

The inspector identifies one previous inspection with a general violation and no serious violations. A review of claims history shows a positive record, and a calculated claims experience factor of 0.5525, well below the industry average. Based on this information, the inspector assigns a "good" history to the employer, thereby reducing the penalty an additional 10 percent of the base penalty. This leaves a final penalty for the violation of $1,500.

Because all penalty adjustments are calculated against the base penalty, it is possible that the calculated penalty will be lower than $100. In fact, the total "possible" reductions total 105 percent of the base penalty. In such circumstances, L&I does *not* pay the employer. Rather, any time the adjusted penalty drops below $100, the minimum penalty of $100 is assessed for that violation. In the same fashion, an employer with more than 100 employees whose gravity calculation comes to 30 or 36 may face a penalty after adjustment in excess of $7,000. In such cases, the penalty is reduced to the statutory maximum of $7,000.

3. Repeat, Failure-to-Abate, and Willful Violations

If a violation is a repeat violation (based on the same hazardous condition, not necessarily the identical standard), the penalty as calculated will be multiplied by the number of such violations within the last three years either within the state or region (depending upon a number of factors, including the gravity of the violation and the extent to which it lends itself to statewide oversight). Thus, a calculated penalty of $1,200 with one previous violation based on the same hazard would become a $2,400 penalty. In the case of general violations where no initial penalty was assessed, the inspector may assess a repeat penalty using a base penalty of $200.

If an employer never corrected a previous violation, the employer will be cited for this "failure to abate." Any penalty assessed in such circumstances must be at least $1,000. The inspector may determine the penalty by assessing the $1,000 minimum, by multiplying the calculated penalty by five, or by assessing the same calculated penalty for the number of calendar days the violation went uncorrected. Normally, such a calculation is capped with a multiplying factor of 30. Obviously FTA penalties can be sizable -- they normally exceed repeat penalties but are lower than those for willful violations. For general violations that did not carry an initial penalty, the inspector may choose not to issue a penalty.

A willful violation of WISHA by an employer carries a maximum $70,000 penalty and a minimum $5,000 penalty. The calculated penalty (excluding good faith, the absence of which has already been factored into the willful calculation) is multiplied by a factor of 10. All willful violations will carry a penalty of at least $5,000.

IV. Post-Citation Processes

A. Extension of Abatement

If an employer believes that the citation does not provide sufficient time to correct the hazards that have been identified, it is not necessary that the employer appeal. Such concerns are best raised during the closing conference, which will enable the inspector to set a reasonable abatement period. However, extensions of abatement can be granted by the appropriate WISHA Compliance Supervisor upon request (provided that the request is made prior to the expiration of the abatement date).

B. Reassumption Process ("First Appeals")

When an employer appeals a citation, L&I has the option to reassume jurisdiction over the citation. Because L&I exercises this discretion frequently (although not in all cases), these matters are frequently referred to as "first appeals" by L&I staff and others. Such appeals are handled on an informal basis by a senior safety and health professional who was not involved in the original citation. Reassumption conferences include an opportunity for such regional hearings officers (RHOs) to hear the employer's side of the story, as well as consider any new information that may have become available. Because reassumptions must be resolved within 30 working days (this can be extended to 45 working days, if agreed by all parties), the informal process frequently allows for much more rapid resolution of an appeal than is possible before the Board of Industrial Insurance Appeals (BIIA). In addition to addressing any deficiencies in the citation itself, RHOs are able to facilitate settlements that can enable an employer to resolve the issue by taking positive steps rather than through continued litigation.

If there is no settlement agreement, the RHO normally issues a Corrective Notice of Redetermination (CNR) either amending or affirming each of the violations and penalties on the original citation. The CNR then becomes the citation of record, and it is subject to appeal to the BIIA.

C. Board of Industrial Insurance Appeals ("Second Appeals")

All WISHA citations and CNRs can be appealed through L&I for review by the BIIA. In this process, an Industrial Appeals Judge (IAJ) will seek first to facilitate resolution of the appeal without a formal hearing. If this is not possible, then either that IAJ or another will hear the case and render a proposed decision. If the proposed decision is not appealed to the full Board (made up of three members appointed by the Governor), it becomes final. If the Board is asked to review the decision, it will render its own decision. Decisions made by the BIIA can be appealed to Superior Court.

It is worthy of mention that IAJs employed by the BIIA handle a relatively small number of WISHA cases. The bulk of the Board's workload is made up of workers' compensation cases, most of them relating to claims adjudication.

V. Practical Observations When Citations Are Challenged

A. Penalty Reductions "Just to Settle" Are Unlikely

Several years ago (following the adoption of the revised WISHA Penalty Chapter), L&I and the Office of the Attorney General (AGO) staff who represent it have determined that settling strong cases simply to avoid litigation is counter-productive. Because WISHA penalties are relatively small, it has in the past seemed worthwhile to reduce penalties somewhat in order to ensure rapid abatement and minimize litigation. However, L&I has determined that such a practice creates an inappropriate incentive to appeal and has worked with the AGO to reverse that incentive. While AGO staff will attend a mediation conference at the request of an IAJ, a refusal to compromise well-documented citations has achieved the desired results.

B. "Employee Misconduct" Is Tough to Prove

While case law provides that employers are not responsible for safety violations caused by "isolated and unpredictable" employee misconduct, the same case law establishes a considerable burden on the employer who seeks to prove such an allegation. If employee misconduct is truly at issue, an employer would be well-advised to raise the issue with the inspector as early in the process as possible. Even if the inspector and supervisor determine that the employee misconduct defense has not been established, the information provided may have a positive impact on the "good faith" aspect of the penalties.

C. *Meaningful* Inconsistency Should Be Addressed

Like any regulatory body, L&I seeks to apply the WISHA standards in a consistent fashion. At the same time, L&I respects the professional judgment of its inspectors and provides them with broad discretion in making many case-by-case determinations. If an employer has been advised that a particular machine need not be guarded and then is cited for the lack of a guard, obviously that represents an inconsistency that requires attention. Whenever an employer can demonstrate that a WISHA inspector -- or WISHA consultant -- provided differing advice regarding an issue, L&I should and will consider such information before issuing any citation. Even if the hazard must be corrected, the employer will have made a strong case against his or her knowledge of the hazard and therefore against any citation.

At the same time, most "inconsistency" raised regarding inspections is quite different. If an inspector did not see a hazard in a previous visit (or perhaps did not cite it because one of the elements of a violation was lacking), that does not represent an endorsement of the condition. By way of analogy, a motorist who drives 68 mph past a Washington State Patrol trooper in a 60-mph zone without getting a ticket should not assume that the speed limit has been raised to 68 mph. And he or she certainly is not going to be able to argue successfully that the first trooper said it was "okay" to go 68 mph when a second trooper issues a ticket for going the same speed. By the same token, an apparent "oversight" of a violation by an inspector -- for whatever reason -- does not represent an L&I endorsement of an otherwise hazardous condition.

Penalty calculations, based as they are on a number of factors requiring a professional judgment of the particular set of circumstances, also raise concerns about "inconsistency." It is perhaps not surprising that most employers who complain about such "inconsistency" assume that the inspector who issued the lowest penalty was correct. However, it is quite possible that there was no inconsistency, simply differing circumstances. And it is even more likely that both inspectors were correct in the sense that they exercised their legitimate discretion within established parameters.

While consistency is an important goal, particularly in relation to the interpretation and application of standards, it is important to understand what may have caused apparent inconsistency before it can be corrected -- or before a decision can be made that there is a genuine question of consistency in the first place.

VI. Summary

It is difficult to describe the wide variation of techniques that may be used in one of the many different types of inspections conducted by WISHA enforcement staff. However, the above guidance provides a broad general overview into which all WISHA enforcement activities can be placed.

WISHA enforcement staff are called to exercise fairness and discretion, but they are also reminded regularly not to lose sight of the goal behind all of their activities: ensuring that employer's pay serious attention to their responsibility to ensure the safety and health of their employees in the workplace. Any discussion of WISHA and WISHA enforcement practices must be placed firmly within that context.